# JOINT SUBMISSION

By

**Amaca Pty Limited**

**Amaba Pty Limited (“Amaca”)**

And

**Asbestos Diseases Foundation of Australia**

**Australian Manufacturing Workers’ Union (NSW Branch)**

**Construction Forestry Mining & Energy Union (Construction Division – NSW Branch)**

**Maritime Union of Australia (Central Sydney Branch)**

**Queensland Asbestos Related Disease Support Society**

**(“UADFA”)**

# Introduction

1. This is a Joint Submission by UADFA and Amaca in response to the call for submissions made by the New South Wales Government in its Issues Paper "Review of Legal and Administrative Costs in Dust Diseases Compensation Claims".

2. UADFA members represent the vast majority of claimants in the Dust Diseases Tribunal of New South Wales ("the Tribunal"). Amaca is a party to over 50% of all claims in the Tribunal.

3. This Joint Submission reflects the Protocol agreed between the parties after many weeks of discussions and has been prepared with the benefit of the results achieved in a small number of cases that were the subject of joint trial and experimentation by the parties in the latter part of 2004.

4. The Tribunal is a jurisdiction where, as a rule, claimants are represented by a small number of specialised, experienced lawyers and the same defendants regularly appear represented by their specialised, experienced lawyers. There are few new defendants and, when one appears, they usually have one of the regular defendant lawyers acting for them.

5. We believe the key to achieving efficient and more economical claims resolution is to focus on the knowledge and experience of the practitioners who regularly practise in the jurisdiction rather than develop procedures which are user-friendly to one off lawyers or litigants in person.

6. This joint approach by UADFA and Amaca represents a historic and radical development in claims resolution. UADFA and Amaca unequivocally believe that the preferred approach is one based on consensus and cooperation as such an approach is more likely to succeed. The Protocol effects changes beneficial for both claimants and defendants via the faster delivery of compensation to claimants and reduced costs to defendants.

7. UADFA and Amaca would welcome the opportunity to expand upon the Joint Submission and the Protocol.

8. UADFA and Amaca commend the content of the Amaca/Amaba Protocol and the Joint Submission to the Government for its consideration.

## The Amaca/Amaba Protocol

9. Annexure "A" is a copy of the agreed Protocol.

10. UADFA and Amaca entered into discussions with a view to finding an alternative, more cost efficient means of dealing with dust diseases claims. We believe the agreed Protocol achieves these aims. The Protocol is a robust compromise achieved by experienced parties. It provides a simple and cost efficient mechanism for dealing with dust diseases claims. The traditional adversarial nature of common law litigation becomes the last resort to resolve claims. It is replaced at the outset by a consensual and cooperative approach. Having developed substantial expertise in common law litigation in the Tribunal UADFA and Amaca know that they can make the Protocol work to achieve its objectives. The provisions of the Protocol respond to the majority of the issues raised in the Issues Paper.

11. During the course of negotiating the Protocol a number of matters were the subject of trial and experimentation utilising some of the features described in the Protocol. To date four matters have been completed utilising Protocol procedures and two further matters are proceeding under Protocol procedures. The successful resolution of these claims on a significantly reduced costs basis reflects the potential savings available to the system as a whole from the use of the Protocol, even if the sample under analysis at present is extremely small. Details of the matters are as follows:

| Claimant | Overall Claim Costs | Total Costs Including Disbursements and GST | Total Costs Overall as a Percentage of Claim Costs |
|---|---|---|---|
| Mr C | $213,000 | $38,000 | 17.84% |
| Mr C | $333,000 | $38,000 | 11.41% |
| Mr M | $307,500 | $47,500 | 15.44% |
| Mr G | $268,000 | $43,000 | 16.04% |
| **Average legal costs as a percentage of overall claim costs** | | | **14.84%** |

12. The following general statements can be made about the matters that have proceeded through the trial and experimentation process:

    (i) The procedure was successful because the practitioners representing the claimant and the defendant were experienced practitioners.

    (ii) The practitioners on both sides were dedicated to adopting Protocol procedures.

(iii) Early resolution of the claims was viewed from the outset as being the objective on each side.

(iv) Claims were resolved with minimal involvement of the Tribunal.

(v) The time period between the initial taking of instructions and resolution of each claim was a period less than twelve (12) weeks, in one instance four (4) weeks.

(vi) All disbursements were incurred by the claimant, the defendant being satisfied with the quality of the expert reports that were provided by the claimant.

(vii) Delays occurred as a consequence of matters completely outside the control of either the solicitor for the claimant or the defendant, eg. Health Insurance Commission payback details, delay in obtaining medical records etc.

(viii) The need to provide quality information at an early stage of the proceedings including an affidavit required the claimant's solicitor to dedicate considerable time and resources at an early stage of the proceedings, in contrast to the method by which claims are currently dealt with where much of the intensive work is done immediately before trial.

(ix) The ability of the defendant to provide instructions quickly was a critical matter in the early resolution of claims under the Protocol.

(x) There was a substantial increase in the time involved at an early stage of the proceedings on both sides.

13. If applied across the board in Amaca/Amaba cases that fitted within the Protocol, costs in those claims are likely to be reduced by up to 50% against current overall claim costs.

14. Whilst the Protocol is described as an Amaca/Amaba Protocol we submit that the Protocol should be extended so as to apply in all single defendant mesothelioma claims in the Tribunal.

15. The Protocol should be introduced by the Tribunal by way of a Practice Note. The benefit of introducing the document by way of a Practice Note is that the Tribunal controls the procedure and can modify the Practice Note if parties experienced difficulties with particular aspects.

16. Under the Protocol parties do not need to appear before the Tribunal on the commencement of proceedings. There would not be any judicial time required in a Protocol matter and cases may in fact be disposed without ever coming before the court and receiving judicial attention. Eliminating appearances at an initial directions hearing immediately reduces costs.

17. An immediate impact of the operation of the Protocol would be greater availability of judicial time to hear cases, both claimant cases and cross-claims.

18. Fundamental to the use of the Protocol is the capacity of parties on either side to opt out of the Protocol if circumstances require it. The Protocol itself envisages this occurring. From the claimant side the sudden and dramatic deterioration of a claimant's health will require an immediate opting out of the Protocol and the entry of directions by the Tribunal. Liability issues may develop during preparation of a matter which will require the defendant to opt out of the Protocol.

19. All relevant matters that come within the classes or categories defined by the Protocol should go immediately into the Protocol upon the filing of the statement of claim.

20. The Protocol may also be appropriate for some claims with an economic loss component, i.e. where the claimant is a wage earner. In Mr M's matter (see paragraph 11) the proceedings involved a small claim for economic loss, uncomplicated, that was easily dealt with by the parties upon provision of the all of the relevant wage and tax documentation from the claimant.

21. More difficult economic loss claims where the claimant is self employed operating a business do not appear to be suitable for inclusion in the Protocol at the present moment in time.

22. A small panel of Assessors should be appointed being legal practitioners with considerable experience in Tribunal claims, preferably experience in acting for claimants and defendants. This will maximise the ability of the Assessor to influence both the claimant and the defendant, thereby increasing the prospects of early resolution.

23. There is potential to expand the Protocol into multiple defendant malignant claims where there is no claim for economic loss. The proposal made at Issue 14 of the Issues Paper that in multiple defendant litigation a nominated claims manager be appointed to represent all

defendants should be adopted. The appointment of one defendant to represent the interests of all defendants in the claimant's action would significantly reduce costs. The Protocol could be amended and/or a separate Protocol developed for streamlining procedures as between defendants so as to enable a nominated claims manager to be appointed during Stage 1 of the process. This is explored further in the discussion of Issue 14 later in the submission.

24. In multiple defendant or cross-defendant cases the Protocol could be extended or a new Protocol developed in order to deal with all cross-claims arising in the litigation. In that way contribution proceedings could also be resolved within the Protocol process.

25. In those instances where cross-claims are not resolved under the Protocol those matters should be referred to the Tribunal for directions and case management.

26. Over time a modified Protocol could be developed to cover non-malignant claims involving both single defendant and multiple defendant claims.

# The Issues Paper

**PRE-COMMENCEMENT PROCEDURES**

**Issue 1: Diagnosis**

*Could costs be reduced by requiring the claimant to be examined by an agreed medical expert with the medical report to be provided to the claimant and to any parties that are potentially liable?*

27. It is rare for a claimant's solicitor to arrange tests to confirm diagnosis. A claimant generally consults a solicitor because a diagnosis has already been made.

28. In mesothelioma claims the diagnosis is usually made following surgery or biopsy. In benign disease claims, asbestos related pleural disease, asbestosis or silicosis, claimants usually seek advice in relation to their common law rights once a diagnosis has been established either following investigations by a respiratory physician or an assessment by the Dust Diseases Board.

29. The claimant's solicitors must at the outset obtain evidence from the claimant's doctors to advise the claimant. They need evidence such as the onset of symptoms for interest claim purposes, details of treatment and care to date and future treatment and care options. They also need evidence to comply with Section 198L of the *Legal Profession Act*, 1987.

30. The Protocol provides for the claimant to provide at the earliest opportunity evidence as to diagnosis, treatment, causation, life expectancy and the current state of the claimant's health. The claimant's treating doctors will ordinarily provide this information. There could well be no need for either party to qualify further medical experts.

31. The suggestion that claim costs could be reduced by requiring the claimant to be examined by an agreed medical expert prior to commencement is, with respect, unlikely to reduce claim costs as medical evidence is generally obtained from the claimant's treating doctors. To qualify further experts prior to commencement will only increase claim costs.

**Issue 2: Investigation of Exposure**

*Should a centrally maintained database be established? If so, by whom? What information should be included on the database? Who should be able to use the database and under what conditions?*

*Should an obligation be imposed on defendants to co-operate with claimants and their solicitors during the investigation stage?*

32. Investigation of claims is a case by case matter in all but common industrial situations. Asbestos containing products are well known. Their use was widespread. Claimant solicitors practicing regularly in the jurisdiction are fully aware of all the asbestos containing products, the manufacturers and suppliers of those products and usually the sales points for those products (eg hardware stores). A database will be of little assistance in claims that will arise in the future, a greater percentage of which will be "third wave" claims where individual investigation will be necessary.

33. There are a number of government departments and instrumentalities that hold relevant historical records including:

    (i) The files of the former Workers Compensation Commission of New South Wales and Compensation Court of New South Wales;

    (ii) Files held by the Dust Diseases Board;

    (iii) Files held by the Department of Health, Division of Occupational Hygiene;

    (iv) Files held by the former Department of Labour & Industry, Inspection Services Branch, which presumably are now held by WorkCover;

    (v) Various departmental files;

    (vi) The records of the power stations.

34. The task of accumulating all of these documents and putting them onto a database is massive. The cost involved would be substantial. There could be some benefit to parties having easy access to workers' compensation insurance records and to the records of inspection of premises held by the Dust Diseases Board. Otherwise it is not clear that the benefit to individual claimants is likely to be significant.

35. Some trade unions have maintained significant historical archival records. It would be inappropriate to require of a union that it provide its archival records, which were created and maintained over many years for the benefit of its members to unknown third parties.

36. Individual defendants maintain archives and historical records. Those records have already been discovered and there would be little point in placing those records onto a database. In any event legal professional privilege issues would arise in relation to some of the documents and ultimately the benefits to claimants would be outweighed by the work involved to obtain non-contentious documents and provide them to the database.

37. As to historical and other documents that are in the hands of parties or their solicitors many of those documents were provided for the purposes of individual cases and then loaned to or retained by the solicitors to facilitate the conduct of other claims. Vast numbers of documents have been located following major projects in public libraries in various parts of Australia, through discovery and through general investigations. Those documents have been located and maintained at considerable cost to individuals, organisations and law firms. We do not support the provision of those records onto a public database and we do not support the erosion of the special expertise of lawyers. These public policy issues were highlighted in the Court of Appeal decision in *Woods v Hanoldt*, 11 NSWCCR 161.

38. In relation to the question as to whether an obligation should be imposed on defendants to cooperate with claimants the Protocol objectives provide that the parties are to cooperate. This extends to Amaca/Amaba confirming any relevant supply of which it is aware.

39. At this stage the Protocol relates to product liability claims only. If the Protocol were to be extended to employment claims then we would urge the insertion in Stage 1 of a provision requiring employers to produce personnel and employment records to the claimant's solicitor within ten working days of receipt of the Statement of Claim. Personnel and employment records are critical in clarifying the precise period of employment of a worker and the precise areas within a particular factory, power station or dockyard where a worker was engaged.

**Issue 3: Commencing a Claim**

*Should the process for commencing a claim be modified? If so, how?*

40. We do not see any need to vary the existing manner in which claims are commenced in the Tribunal.

41. A Statement of Claim when filed and served puts the defendant on notice of the nature of the claim, describes the factual circumstances that give rise to the claim and sets out the damages that the plaintiff seeks. A Statement of Claim contains the very material which would need to be provided in any form of claim notification.

42. A Statement of Claim enables the defendant to commence its own investigations in view of the detailed information contained within. This is of particular importance for the early resolution of claims. In any event the Protocol provides for the early provision of all relevant information.

43. We foresee difficulties if a procedure of notifying claims other than a Statement of Claim is adopted. It is essential that a claimant with a terminal disease can approach the Tribunal urgently to seek a hearing if his condition rapidly deteriorates. After having already provided information to potential defendants to then require a claimant to file a Statement of Claim to access the Tribunal will inevitably involve delay, double handling and increased costs. Further, if a claimant has had asbestos exposures in different states or territories he may need to commence proceedings to protect his rights in respect of those different exposures. In addition, how would a deregistered company be given notice of a claim?

44. The Protocol envisages investigations being made by the parties. Utilisation of the Tribunal subpoena process is an important part of those investigations. In order to be able to invoke that process proceedings need to have been commenced.

45. The filing fees in the Tribunal are a matter for the Government to regulate. Stages 1 and 2 of the Protocol require only minimal action by the Tribunal. The Government may consider deferring the filing fee or a substantial part of the fee until later in the litigation process, eg upon setting a timetable at Stage 3 of the Protocol process.

**Issue 4: Data Concerning Pre Claim Procedures**

*What data is there concerning the costs incurred in preparing a claim?*

46. We have no information available to assist the Review on this issue. If other parties do produce such information we would appreciate the opportunity of analysing the information and perhaps making further submissions.

47. Experience is that in relation to some claims, such as James Hardie/Wunderlich/Bells employee mesothelioma claims, the cost of pre claim procedures would be minimal. In other cases, such as complex public and product liability claims requiring significant investigations, the costs can be considerable.

## FACILITATING THE EARLY SETTLEMENT OF CLAIMS

### Issue 5: Early Settlement

*What comparative data is available concerning legal costs incurred in relation to claims which settle at different points in the process? Does the type of claim (eg lung cancer, mesothelioma) affect the level of legal costs and the point in time at which claims settle?*

48. We are unable to provide any comparative data concerning legal costs incurred in relation to claims which settle at different points in the process. We have already provided details of the costs of the four claims that have proceeded under the Protocol. In each of these claims the costs were significantly reduced.

49. It is axiomatic that the earlier a matter settles the lower the legal costs. The aim of the Protocol is to facilitate early settlement. The Protocol provides for early offers, negotiations and a settlement conference. The next step is ADR and, only after that has been exhausted, does a matter proceed to a hearing in the Tribunal.

50. There is a threshold level of information and investigation which must be carried out before settlement negotiations can commence. That level of information and investigation is essentially contained in Stage 1 of the Protocol. The cost of these investigations will differ in each case. Often claimants with mesothelioma are too ill to travel and their solicitor must attend on them at their home or a hospital to take instructions. It may be necessary to take instructions over a number of shorter interviews. For many claimants English is not their first language and they require an experienced interpreter. Some claims will require significant factual investigations.

51. Different disease types affect the complexity of the conduct of the proceedings and settlement processes and, accordingly, affect the level of costs and the time taken to achieve settlement. In indivisible disease cases (i.e. mesothelioma, other cancers and progressive massive fibrosis) there is often only one defendant. The claimant's claim is simplified by the absence of apportionment questions and the focus on quantification of overall damage.

52. On the other hand divisible disease cases (eg asbestosis, ARPD and silicosis) usually involve a number of defendants with differing types of liability (eg manufacturers/suppliers, employers, occupiers) and views as to relative apportionment and quantum. The claimant must prepare his case against each defendant. This often involves the claimant attending medical examinations on behalf of each defendant and answering requests for particulars

from each defendant. Settlement is made more difficult and in some cases impossible when defendants cannot agree as to apportionment. Costs in divisible injury or multiple defendant matters are significantly higher as a result. We anticipate that many of these costs can be reduced as the Protocol expands to cover multiple defendant cases.

**Issue 6: Exchange of Information**

*Should parties be required to exchange some or all of the information they have before the hearing in a case? At what point should they be required to exchange information – before filing, at the time of filing, within a fixed period after filing?*

*If so, what information should be disclosed? Should it be limited to medical reports or other expert reports? Should the claimant be required to prepare witness statements or affidavit evidence outlining their claim and also provide that material?*

*What should be the consequences of failing to disclose information? Should a party be prevented from relying on material later in the proceedings which they have failed to produce?*

53. The Protocol has as one of its objects the cooperative approach to clarifying and resolving issues.

54. The Protocol provides for the earliest provision of the claimant's evidence on exposure and medical issues. The matter does not progress until that information is provided and the claimant provides all documents relied on.

55. Our limited experience with the Protocol is positive. Information was provided to Amaca as soon as it became available to Turner Freeman. Based on the information provided offers were made and the cases resolved with minimal action by the Tribunal.

56. If the Protocol were to expand and/or become more widely used it would be appropriate that a party who could have relied upon a document or material at Stage 1 (investigation, negotiation and settlement conference) or Stage 2 (ADR) should not be able to use that document or material in later proceedings in the Tribunal. At the least there should be a presumption against the use of that material with the onus on the party seeking to adduce that material to explain why it was not utilised earlier.

**Issue 7: Settlement Conferences and Alternative Dispute Resolution**

*Is there any data available which highlights the average costs incurred where matters settle at this stage of the process, particularly when compared to those which settle on the first hearing date?*

*Should settlement conferences be used more widely in the Tribunal? How can the existing procedures be enhanced? Could other forms of ADR be used more widely? Should the Tribunal be able to order ADR without the parties' consent?*

*When should alternative dispute resolution/settlement conferences occur? Should this occur prior to filing, immediately following commencement or at some other time?*

57. As stated earlier it is axiomatic that the earlier in the litigation process a matter settles the lower the legal costs. Our experience of the Protocol to date confirms this.

58. In the Tribunal once a matter has progressed to the first hearing date substantial Counsel's fees have been incurred. These are not only the fees of Counsel's brief on hearing but the substantial costs of Counsel having conferences with witnesses and advising generally prior to the trial date.

59. The Protocol incorporates extensive and compulsory alternative dispute resolution processes (ADR). The Protocol provides for negotiation and settlement conferences in Stage 1. Stage 2 is all ADR. It is a robust ADR procedure intended to address the issues quickly and efficiently. It is intended the Assessors be experienced practitioners in the jurisdiction, preferably having acted for both claimants and defendants. We believe that settlement conferences and ADR will work best in the context set out in the Protocol, i.e. as an integral part of the litigation process.

60. The current ADR process utilised in the Tribunal does not have a high level of success. Junior solicitors with little authority and inadequate instructions frequently attend them. This is despite the ILC occurring after the preparation phase of the timetable has completed. The present system applies no pressure on parties to achieve a result. There is usually no penalty attaching to any party who doesn't even try to achieve a result at ILC. Under the Protocol parties are required to make offers of settlement and to negotiate. ADR must be attended by a representative of the defendant with authority to settle the claim and, where possible, by the claimant. Counsel may not represent parties. The Assessor will have an active role in promoting settlement and where settlement cannot be reached will proceed to

determine the claim. Costs penalties will apply if a claim proceeds post ADR without a better result.

**Issue 8: Offers of Settlement and Cost Penalties**

*Should parties be required to make mandatory offers of settlement, either as part of a settlement conference, ADR or otherwise?*

*How can existing cost penalties be used more effectively to promote settlement?*

*Should the Tribunal's discretion to override cost penalties be constrained? What form should any cost penalties take?*

61. The Protocol requires that if liability is not in issue an offer be made. If the matter cannot be subsequently settled by negotiation or at a settlement conference the matter will proceed in Stage 2 to ADR. If that process does not achieve a settlement the Assessor will proceed to determine the matter.

62. The Protocol contains costs penalties where the matter proceeds and a better result is not obtained and where liability is unsuccessfully put in issue.

63. The Supreme Court Rules in their application to the Tribunal ought to be amended to meet the particular needs of the Tribunal. Part 22 of the Rules currently requires an Offer of Compromise to be open for at least twenty eight (28) days. This can be too long in the Tribunal where matters can be called on more quickly. The standard period should be reduced to no more than fourteen (14) days and possibly an even shorter period. Further the cost penalties in Part 39A Rule 25 of the *District Court Rules* should apply in the Tribunal.

## STREAMLINING LEGAL AND ADMINISTRATIVE PROCEDURES

### Issue 9: Request for Particulars

*Could the information sought in the particulars be more efficiently and expeditiously obtained through a different process of early disclosure of information?*

*Could the process be streamlined by providing that requests for particulars are only allowed in exceptional circumstances, perhaps only with the leave of the Tribunal?*

*Is this process currently effective and efficient at obtaining relevant information on issues in dispute?*

64. Under the Protocol there is no provision for particulars to be requested. The defendant will receive all of the information by way of a sworn affidavit shortly after the proceedings are commenced. The defendant can seek further clarification from the claimant. This all happens in a cooperative framework. Under the Protocol the defendant is provided with all of the claimant's evidence up front in contrast to the existing timetable structure currently operating in the Tribunal.

65. Where matters do not proceed under the Protocol the Tribunal should have the power to order claimants to provide further particulars to defendants provided the particulars are relevant to the matters in issue.

**Issue 10: Discovery and Interrogatories**

*Are these processes currently effective in resolving issues in dispute in claims before the Tribunal? Could the processes be simplified? Could the processes be amended to be focussed more closely on the matters in issue?*

*Should interrogatories and discovery be restricted to only those claims that will definitely proceed to be resolved at trial?*

66. Specific discovery in employment cases is required in all cases, whether they are covered by the Protocol or otherwise.

67. The Protocol contains no requirement for general discovery or interrogatories. Even if a matter proceeds through to litigation in Stage 3 it unlikely that discovery or interrogatories will be required as liability will not be in issue.

68. Where liability is put in issue discovery is of critical importance. A number of defendants who are regular litigants in the Tribunal have filed standard lists and provided a copy to all other regular parties in the jurisdiction. The standard discovery list is not served in each case. A discovery list can be extremely useful provided a party makes use of it and knows what it contains. The expertise of lawyers who regularly practice in the Tribunal is based in part upon their detailed understanding of the material contained in the various standard lists of documents.

69. The need for interrogatories will vary on a case by case basis. Where liability is in issue the claimant should be permitted to interrogate the defendant as to matters in issue.

70. If the Protocol is given expanded application then, based on our experience and given the cost penalties in the Protocol where liability is put in issue, we believe that general discovery and interrogatories will be required in only a small number of claims.

**Issue 11: Subpoenas**

*Could the costs associated with subpoenas be reduced? Is it possible that the information sought through subpoenas could be obtained in another way?*

*What other options exist for streamlining the procedures associated with subpoenas?*

71. The Protocol requires the claimant provide many of the records required by a defendant to assess a claim. In simple cases the claimant may provide all the records required by the defendant.

72. Subpoenas however remain an essential part of the investigation process. They provide the only means for compelling production of records by persons or organisations not party to the proceedings. A number of organisations will not release documents without a subpoena. Even where organisations provide documents the time taken to obtain the documents can be prolonged and the payment required for production is similar to and in some cases greater than the cost of a subpoena.

73. The process of obtaining access to documents produced under subpoena in the Tribunal should be modified to bring it into line with procedures utilised in other jurisdictions. The present requirement, that parties attend, adds unnecessary costs to the litigation. Administrative procedures should be put in place as in the District Court whereby upon receipt of subpoenaed documents the Court notifies the parties electronically. Standard procedures for inspection and claiming privilege should be implemented. Those procedures should not require parties to appear before a Registrar of the Court except in unusual circumstances.

74. A list of subpoenas issued in each matter should be available to all parties to avoid unnecessary duplication.

**Issue 12: Tribunal's Streamlined Procedures**

*Could the existing procedures in the Tribunal be strengthened or amended? Do other options exist to enhance the savings provided by these provisions?*

*In particular, how could the process for securing admissions under section 23(1)(b) be better utilised?*

*Should there be any limitation on the evidence that can be raised by the parties in proceedings before the Tribunal? For example, should parties be limited to using evidence which has already been raised in any pre-trial procedures which have been engaged in by the parties?*

75. Many interlocutory matters are dealt with by consent in the Tribunal. The directions lists and subpoena lists can be very time consuming. The Tribunal should develop systems, particularly on-line systems, to deal with Consent Orders to avoid the need for parties to attend in person at the Tribunal or to be required to sit through long court lists for a consent matter.

76. At present, claimants routinely seek admissions under Section 23(1)(b). Experienced practitioners acting for defendants do seek admissions and do make admissions. The use of admissions reduces the cost of proceedings and obviates the need for interrogatories.

77. Section 23(1)(b) admissions apply particularly to questions of liability and as such will have limited application to Protocol matters. The Protocol contains wholly new streamlined provisions. The Protocol encourages such admissions by costs penalties where liability is unsuccessfully put in issue.

78. Where liability is put in issue and a matter does not proceed under the Protocol we believe that the Judges should take a much more proactive role in the ascertainment of issues to be tried. This would require parties on both sides to be fully appraised of the matters in issue at the time the claim is listed for trial. Cost penalties should flow when parties unreasonably refuse to make admissions.

79. As to limitations on the use of evidence see the comments under Issue 6.

**EXPERT WITNESSES**

**Issue 13: Use of Expert Witnesses**

*What evidence is there that the process for obtaining expert evidence before the Tribunal is not effective? Are parties obtaining an unnecessary number of expert reports?*

*Should the processes for obtaining expert evidence before the Tribunal be reformed? If so, how? Should the cost of expert reports be regulated?*

*What data is available?*

80. Under the Protocol the extensive use of expert witnesses will not occur. Those matters that have proceeded under the Protocol to date have not required the defendant to obtain any expert reports. The disbursement outlays in the four completed Protocol matters are evidence of significant reductions in disbursements.

81. If the Protocol is extended to cover non malignant or multiple defendant claims it is likely that the defendant(s) would want the claimant to be medically examined. The use of a claims manager (see Issue 14) will substantially reduce costs by limiting the defendants to a single expert in each area of expertise. If the Protocol is extended to cover claims where economic loss is involved the same considerations will apply.

82. Matters that do not proceed under the Protocol are likely to involve issues of liability or large economic loss claims. These claims will probably involve disputes of a scientific nature or in relation to an element of damages where expert opinions will be of considerable importance in the determination of issues. The Tribunal has been required to consider and adjudicate upon difficult questions of fact requiring analysis at times of large quantities of scientific evidence and publications. This will continue. The capacity to do this in a way that is fair to both parties and in a manner that provides the greatest assistance to the Tribunal should not be interfered with.

83. We do not believe that the existing rules for retaining expert witnesses in the Tribunal should be varied other than parties should be limited to the evidence of one expert witness in each area of expertise.

84. We are not aware of an unnecessary number of expert reports being obtained in the Tribunal.

85. We are not aware that any significant amount of Tribunal time is taken up adjudicating on conflicting expert evidence.

86. We do not support a proposal whereby panels of experts are utilised. The pathology and aetiology of dust diseases are an area of significant scientific debate. Experts often fall within one school of scientific thought or another. A panel of experts may prejudice either a claimant or defendant where the majority fall in one school.

87. We note with interest Practice Note 128 which is shortly to commence operation in the Supreme Court. The evidence to which the practice note would apply in a Tribunal claim would likely be limited to an occupational therapist. There are a limited number of occupational therapists with expertise in dust related conditions. Occupational therapists are generally retained in malignant cases and under the Protocol a report will be provided by the claimant in Stage 1. In the matters that have proceeded under the Protocol to date Amaca assessed the claimant's evidence and determined that it did not consider it necessary to qualify further evidence.

88. The use of a single qualified expert may well add an extra layer of expense over and above the expense incurred at present in qualifying expert evidence as it is not until each party has its own evidence, which is in conflict with the other party's, that the need for a single qualified expert arises or even becomes apparent.

89. Compulsory expert conferences are unnecessary. There are not many issues in dispute so far as each expert is concerned. Again such conferences would add a layer of expense, which does not exist at present.

90. As to lists of agreed experts, the number of experts involved within the categories described is extremely limited and are well known to the parties and to the Tribunal. A list would do no more than affirm known existing experts.

91. A proposal to regulate and limit the cost of expert reports would be, in our respectful submission, unworkable. There is not a large pool of available respiratory physicians or occupational therapists with expertise in asbestos related diseases. Examinations often require home visits to obscure locations away from capital cities.

92. If a party wished to retain a particular expert, the only known expert in the area within Australia, and the party was limited as to the amount that they could pay for the report, then

the party might in fact be prohibited from obtaining the report because of the refusal of the expert to provide a comprehensive scientific report at a minimal cost.

93. Overall, medical experts who practice in the area of dust diseases do not charge excessively. Greater costs are attached to pathologists, occupational therapists, occupational hygienist and accountants. The work performed by these experts is, however, by the very nature of the work often complex and detailed requiring many hours of analysis prior to the provision of a report.

**CONTRIBUTION PROCEEDINGS AMONG DEFENDANTS**

**Issue 14: Streamlining the Process for Contribution Disputes**

*How can the process for resolving contribution claims among defendants be streamlined?*

*What data is available on the legal costs associated with resolving contribution claim(s) (as distinct from resolving the primary claim of the claimant)?*

94. The Protocol objectives include the maximisation of recovery opportunities from third parties for Amaca/Amaba. Clearly such objective could extend to any other defendant in the Tribunal. Recovery is usually by way of cross claims.

95. The Protocol envisages available cross claims will be issued as soon as practical so as to minimise severance of cross claims from the hearing of the principal proceedings. Where cross claims have been issued the cross defendants will participate in ADR.

96. Experience to date is that in multiple defendant claims settlement is delayed and costs are significantly higher than in single defendant claims. The Protocol at this stage does not extend to multiple defendant claims but does envisage an expansion in its scope. Such expansion should include multiple defendant proceedings.

97. The advantage of multiple defendant matters and cross claims proceeding under the Protocol is that the defendants will be provided with all of the claimant's material at an early stage of the proceedings. Claimants invariably nominate the extent to which they believe a party is liable.

98. The proposal contained in the Issues Paper for the appointment of a nominated claims manager is one that has considerable merit. We support the proposal.

99. Prior to 1998, if multiple workers' compensation insurers insured a defendant, in the absence of agreement, claimants were put to enormous expense in litigating claims directly against a defendant whilst the insurers argued in the background. UADFA put forward a proposal that was ultimately adopted by the Government and now appears as Section 151AC of the *Workers Compensation Act*, 1987. The provisions of Section 151AC achieve a result similar to that which would be achieved by the appointment of a claims manager on behalf of multiple defendants. The enactment of Section 151AC has brought to an end all

insurance disputes in multiple insurance situations by the appointment of a designated insurer.

100. If the claims manager option is adopted and multiple defendant matters proceed under the Protocol, the Protocol could be amended to add into Stage 1 an apportionment and quantum conference between defendants and cross defendants prior to negotiating with the claimant. If agreement as to a claims manager and apportionment and quantum cannot be reached at that conference, as put forward in the Issues Paper, the claims manager should be that party most likely liable for the greatest contribution. If agreement cannot be reached as to that party the matter should be listed before the Tribunal to appoint a claims manager.

101. The claims manager will conduct the proceedings with the claimant to finality. The other defendants and cross defendants should be present at settlement conferences and at ADR. If apportionment is disputed between defendants the Assessor should assess apportionment at the same time as assessing the claim. If the claimant's claim settles the contribution proceedings should continue through the Protocol process until resolved.

102. Cross claims filed after the proceedings with the claimant have resolved should proceed under the Protocol with amendment as required.

103. Amaca has previously provided to Government and other entities substantial statistical data. Amaca is currently reviewing its latest data and will provide any output which differs from or complements previous data.

**REDUCING LEGAL COSTS AND DISBURSEMENTS**

**Issue 15: Data Concerning Legal Costs**

*What data is available concerning legal costs in the dust diseases compensation system? The review is particularly interested in obtaining data on average legal costs per claim, with reference to:*

*(i) the main compensable condition suffered by the plaintiff;*

*(ii) the time taken to resolve the claim;*

*(iii) the amount of legal costs incurred at each stage of proceedings (eg up to the point of filing the statement of claim say, then between filing the statement of claim and the Issues and Listing Conference and the trial/settlement);*

*(iv) the average legal costs incurred in completing each of the procedures discussed in Issues 9, 10 and 11;*

*(v) the number of defendants;*

*(vi) the legal costs attributable to resolving the primary claim (between the claimant and the defendant) and to contribution claims.*

*Should parties be required to identify legal costs separately from damages awards, with centralised reporting of such amounts?*

104. Amaca has previously provided to Government and other entities substantial statistical data. Amaca is currently reviewing its latest data and will provide any output which differs from or complements previous data.

105. The adoption of the Protocol as proposed will eradicate the concerns that have been raised under this issue, certainly as between claimants and defendants. We have at an earlier stage set out claim costs as they relate to the four matters that have been completed under the Protocol to date. The total costs (including disbursements and GST) recovery as a percentage of claim costs in the four matters is between 11.41% and 17.84%. Average total costs show a reduction to 14.84%.

106. Early resolution under the Protocol will drive down legal costs. The remaining claims that proceed to trial will be a relatively small percentage of total claims. It is unlikely that the

costs generated in those matters will significantly impact upon the overall legal and administrative costs of claims in the Tribunal.

107. There could be a difficulty with specifying legal costs separately from damages awards. It can take some months for costs to be assessed. In any event only the claimant's costs would be recorded. Not all costs are known as at the date of settlement or judgment.

**Issue 16: Regulating Legal Costs**

*Should legal costs in the dust diseases jurisdiction be regulated? If so, what system should be used?*

108. We do not support the proposal to introduce a regulated cost system as applied prior to 1994 for claims in the Tribunal. We believe that any costs regulation should encourage expertise, professionalism, commitment and adherence to the objects of the Protocol.

109. We believe the process improvements implicit in the Protocol will deliver significant cost savings. The matters that have been resolved under the Protocol indicate that within a time based fee system considerable cost savings will be achieved through the implementation of the Protocol.

110. We believe that the greatest efficiencies in claim resolutions are achieved with compromises between experienced senior practitioners. Costs options ought not force these practitioners out of the jurisdiction. For the Protocol to operate effectively experienced practitioners will need to continue practising in the jurisdiction. It is the use of expertise and experience that will facilitate the resolution of claims particularly as the Protocol does not envisage the use of counsel. It will be critical for all parties to have access to high quality legal representation throughout the various stages of the Protocol.

111. The staged system costs such as currently exist under the workers compensation system is not appropriate. The payment of costs upon performing various tasks has the effect of encouraging the dragging out of issues and needless point taking.

**Issue 17: Costs Assessment**

*Should costs be assessed before an officer of the Tribunal?*

112. The suggestion that in every matter the legal costs be assessed or determined before the Tribunal is opposed. Such a suggestion will only increase costs and delay in claimants receiving their monies. No other jurisdiction regulates costs in this way. In all jurisdictions parties are given the opportunity to agree as to costs. It is only in the absence of agreement that costs are assessed by way of a formal assessment process.

113. In those instances where parties cannot agree as to costs we support the Tribunal having control over costs within its jurisdiction. We support the appointment of costs assessors with special expertise in Tribunal matters being appointed to assess costs where disputes arise.

**NOMINAL DEFENDANT**

**Issue 18: Reducing Legal Costs for Extremely Difficult Claims**

*Should a nominal defendant scheme be introduced to fund some asbestos related compensation claims? In what cases would this be beneficial for claimants? How often is the complexity of the case an issue for claimants?*

114. UADFA and Amaca have made separate submissions on this issue.

Dated this 14th day of January 2005.

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Dennis Cooper, Managing Director
For and on behalf of Amaca Pty Limited

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Barry Robson, President Bernie Banton, Vice President
For and on behalf of the Asbestos Diseases Foundation of Australia

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Paul Bastian, State Secretary
For and on behalf of the AMWU (NSW Branch)

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Peter McClelland, Acting State Secretary
For and on behalf of the CFMEU (Construction Division, NSW Branch)

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Robert Coombs, Branch Secretary
For and on behalf of the MUA (Central Sydney Branch)

Shirley Joan White A.M.
__________________________

Shirley White, Secretary
For and on behalf of Queensland Asbestos Related Disease Support Society